

SUBCONTRACTING

New Jersey law authorizes boards of education, and other public employers, to subcontract services. Under *Local 195 IFPTE, 88 N.J. 393* (1982), boards may decide to enter into a subcontracting arrangement without the obligation to negotiate the decision with the majority representative of their affected employees. However, boards' authority to subcontract is not unlimited, but is restricted by both labor law and school law. Therefore, it is important for boards to understand the range of their options and the labor relations factors that need to be included in the consideration of their subcontracting options.

Subcontracting Defined

Subcontracting, also known as privatization or outsourcing, means that work necessary to a school district's operation is shifted from a board's employees to the employees of another employer. The other employer can be a private contractor, another school district or even an individual who is self-employed. Under a subcontracting arrangement, the school district enters into a contract with the other employer to arrange for the delivery of the service. The individuals who will be performing that service will not be employees of the school district.

It is important to distinguish subcontracting from a transfer of unit work. In a transfer of unit work, work previously performed by members of a bargaining unit is shifted to members of another bargaining unit, or to a district employee who is not a member of a bargaining unit. In these situations, the work is still being performed by an individual who is employed by the board. Unlike subcontracting, transfer of unit work is deemed to affect terms and conditions of employment within the district and, as such, requires negotiations. *Rutgers*, PERC No. 82-20, 7 *NJPER* 12224, aff'd App. Div. Dkt. No. A-468-81T1 (5/18/83).

Boards must thus understand the differences between the negotiable issue of transferring unit work and the nonnegotiable decision to subcontract services. Yet, boards also need to be prepared that their careful distinctions may not eliminate the possibility of union allegations that their action violates employers' obligations towards employees' rights under the law. Thus, boards need to be aware of the legal framework that governs their ability to subcontract services.

Legal Considerations: The PERC Law

The Public Employment Relations Commission (PERC) is the primary agency that determines the extent of board's rights and obligations under New Jersey's labor law. As such, unions have often called upon PERC to review boards' subcontracting decisions. The Commission's decisions, based on the central principles delineated in the New Jersey Supreme Court's decision in *Local 195, 88 N.J. 393* (1982), have resulted in a body of case law that defines the extent of boards' right to subcontract their services.

The Framework: *Local 195*

In *Local 195*, the New Jersey Supreme Court held that the decision to subcontract services is a managerial decision concerning how work will be performed and how services will be delivered. As such, the decision itself cannot be subject to negotiations. However, the Court also held that the parties could negotiate over the procedural aspects surrounding a subcontracting action, such as adequate notice of subcontracting; procedures for layoffs; and consultation with the union over the decision to subcontract when that decision is based solely on fiscal consideration.

Yet, the Court specified that employers' authority to enter into subcontracting arrangements was not unlimited. The Court stated:

*We emphasize that our holding today does not grant the public employer limitless freedom to subcontract for any reason. The State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. **State action must be rationally related to a legitimate government purpose.** Our decision today does not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees. (at 411, emphasis added.)*

These judicially established principles have guided all of PERC's decisions in resolving subcontracting disputes.

Assessing Motivation

Given *Local 195*'s clear limitations on the authority to subcontract, it is not surprising that unions have filed numerous claims of "bad faith" subcontracting. Occurring in the context of PERC's unfair practice proceedings, these claims generally allege that the subcontracting decision was not rationally related to a legitimate governmental purpose but rather reflected the employer's underlying motivation to ignore its legal obligation under the PERC Act. In these cases, PERC will scrutinize the facts and events surrounding the subcontracting decision to determine whether the board's underlying motivation for its subcontracting decision was illegal under the Act.

Illegal Motivation In general, a subcontracting action will be held to be illegal if PERC finds that the decision was:

- **motivated by the employer's desire to avoid its negotiations obligation**, *Glassboro Housing Authority*, PERC No. 90-16, 15 *NJPER* 20216; and/or
- **motivated by a desire to retaliate against employees for the exercise of their rights to organize and negotiate**, *Dennis Township Board of Education*, PERC No. 86-89, 12 *NJPER* 17005.

Specific evidence of illegal motivation has been found when: the timing of the subcontracting decision was closely related to the employees' decision to unionize for the purposes of negotiations; or the decision was motivated by frustration with difficult and protracted ongoing negotiations; and that the savings effectuated from the action were not sufficient to demonstrate an unrelated legitimate business reason for the action. When PERC has found the subcontracting to have been illegally motivated, it ordered the board to pay the employees displaced by the subcontracting the full salary they would have received, had the subcontracting not occurred. *Dennis Township Board of Education*, PERC No. 86-89, 12 *NJPER* 17005.

Legal Motivation Charges of bad faith will be dismissed when a board can prove that it had legitimate business justification for its decision to subcontract. Evidence of rational and valid motivation has been found when the facts indicated that the board: considered subcontracting before employees were unionized and before negotiations began; did not ignore or bypass the union; and obtained sufficient savings from its actions. A factual pattern that demonstrates the board's legitimate motivation can be sufficient to overcome evidence of the board's hostility to unionization when it can be proven that the board would have decided to subcontract, even in the absence of a union and a negotiations obligation. *Bogota Board of Education*, PERC No. 91-105, 17 *NJPER* 22134.

The Negotiated Agreement and Subcontracting

PERC has also been called upon to determine the impact of contractual clauses on a board's ability to

subcontract. In resolving these scope of negotiations issues, PERC has issued the following rulings.

Nonnegotiable Issues Given the holding in *Local 195*, PERC has consistently found that negotiated provisions cannot interfere with a board's right to exercise its lawful right to subcontract services. Thus, PERC has held that:

- *an existing agreement cannot serve as a bar to the decision to subcontract* and that a board has the legal right to subcontract during the life of an existing agreement. *Ridgewood Board of Education*, PERC No. 93-81, 19 *NJPER* 24098, aff'd, App. Div., April 4, 1994, cert. den. 137 *N.J.* 312 (1994);
- *clauses precluding subcontracting are not negotiable*: Clauses that would preclude a board from entering into a subcontracting agreement are illegal topics of negotiations and thus void and unenforceable. *Lower Camden County Regional High School Board of Education*, PERC No. 93-65, 19 *NJPER* 24057. A proposal that required at least a six-month notice of the intent to subcontract was found to be nonnegotiable as it appeared to broadly prohibit the implementation of all subcontracting decisions for that period of time and would prevent a board from responding to fiscal emergencies. *Holmdel Twp. Board of Education*, PERC No. 2000-43, 26 *NJPER* 31008. Further, a clause addressing the negotiable issue of preserving unit work cannot be read to prevent subcontracting. *Middlesex County Community College*, PERC No. 94-2, 19 *NJPER* 24181;
- *challenges to a decision to enter into subcontracting are not arbitrable*: Grievances challenging a board's right to subcontract services cannot be legally submitted to binding arbitration. *Long Branch Board of Education*, PERC No. 95-63, 21 *NJPER* 26076. Thus, in response to a board's filing of a scope petition, PERC will issue a permanent restraint of arbitration of grievances that challenge the board's decision to subcontract.

Although the decision to subcontract is not within the scope of negotiations, a number of issues that surround the decision and impact on employees' terms and conditions of employment are negotiable.

Negotiable Issues PERC has found the following issues to be mandatorily negotiable:

- *the right of the union to discuss subcontracting that is motivated by economies*, *Old Bridge Township Board of Education*, PERC No. 88-143, 14 *NJPER* 19194; *New Jersey Sports Authority*, PERC No. 90-63, 16 *NJPER* 21023;
- *notice of subcontracting*, *Long Branch Board of Education*, PERC No. 95-63, 21 *NJPER* 26076. Note, however, that a proposal for at least a six-month notice of an intent to subcontract is not negotiable as it is so broad as to essentially preclude a board from responding to fiscal emergencies. *Holmdel Twp. Board of Education*, PERC No. 2000-43, 26 *NJPER* 31008;
- *procedures for laying off employees, including recall rights*, *Bogota Board of Education*, PERC No. 91-105,

17 *NJPER* 22134; *Pennsville Board of Education*, PERC No. 84-21, 9 *NJPER* 14246;

- *severance pay*, *Pennsville Board of Education*, PERC No. 84-21, 9 *NJPER* 14246.

Arbitrable Issues Issues that are within the scope of negotiations can also be legally submitted to binding arbitration, if the parties' grievance procedure provides for that procedure as the terminal step to resolve grievances. Thus, grievances addressing the negotiable topics listed above can be included in a negotiated agreement and PERC will not restrain arbitration of grievances that assert that the employer violated these contractual provisions.

In addition, PERC has held that disputes involving questions as to whether the work is performed by an independent contractor or an employee of the board that is covered by a contract's recognition clause are arbitrable. PERC has found that these disputes focus on an interpretation of a contract provision and are thus within the purview of an arbitrator. *Lower Camden County Regional High School Board of Education*, PERC No. 93-65, 19 *NJPER* 24057.

However, PERC has also held that claims that a subcontracting decision was taken in bad faith cannot be subjected to binding arbitration but must be submitted to another forum.

Scotch Plains-Fanwood Board of Education, PERC No. 94-28, 19 *NJPER* 24254. While PERC is the primary agency to hear subcontracting disputes that implicate labor law, the Commissioner of Education is the appropriate forum to resolve disputes that claim that subcontracting decisions violated school law.

Legal Considerations: School Law

A number of claims that school law precludes subcontracting have been submitted to the Commissioner of Education. The issues that involve school law's possible limitations on school boards' ability to subcontract are simply flagged in this Labor Relations Issue Summary. Boards are urged to consult with their attorneys to fully understand the implications of school law and to be aware of the latest case law developments in this area.

The Commissioner of Education, like PERC, will examine the specific factual pattern of each dispute to establish the board's underlying motivation and the nature of the subcontracted services. These inquiries will consider the following factors:

- **tenure rights** are not, in and of themselves, an absolute and automatic bar to a board's ability to subcontract. However, subcontracting decisions that are seen to be simply motivated by a desire to avoid tenure obligations may be seen to be illegal, bad faith decisions, *Hunterdon Central Regional High School Board of Education*, App. Div. Dkt. No. A-5036-87T2, June 28, 1989, affirming a May 6, 1988 State Board decision;

- **boards' authority under statutes** to contract for

the specific service. In *Impey v. Board of Education of the Borough of Shrewsbury*, 142 N.J. 388 (1995), the Court affirmed the board's decision to contract with an educational services commission to provide speech correction services. The Court also held that the board's concurrent right to abolish the existing speech correctionist position and terminate the employment of a tenured teacher for economic reasons did not violate statutory tenure rights.

Note: In this decision, the Court relied on the fact that boards of education had specific statutory authority to enter into a contract with an ESC to provide speech correction services. Specific statutory authority to contract professional services is, however, limited to certain positions. As of September 1997, school boards' general authority to subcontract other teaching and administrative positions has not been addressed by the courts.

Please consult with your board attorney if you are considering subcontracting of certificated positions.

Practical Considerations

The decision to subcontract, while not triggering a negotiations obligation, requires careful consideration of a number of issues. Understanding the case law framework governing subcontracting decisions (summarized above) is but the first of many issues that boards must consider. In fact, case law's requirements that employers' decisions must be rationally related to a legitimate governmental purpose immediately suggest the need for boards to engage in practical and careful analysis of the costs and benefits of pursuing their subcontracting options. The best defense to a union's allegations that the decision to subcontract is arbitrary, capricious or otherwise illegally motivated is to demonstrate the anticipated cost savings and other efficiencies that can be available through the subcontracting of services.

Thus, before deciding to enter into a subcontracting arrangement, boards must carefully assess their current operations and identify their needs for specific services. Boards must explore the possibilities of cost savings and balance the potential efficiencies and difficulties of subcontracted services. Boards must then frame their specifications and solicit bids for their required services. This complex and prolonged process needs to be undertaken by each board that is considering the possibility of subcontracting as there is no boilerplate formula that can be applied to the particular circumstances of each district. However, an awareness of other districts' experiences with subcontracting can help boards to negotiate beneficial contracts with subcontractors, to anticipate unions' possible reactions to the board's exploration of its subcontracting option, and to design a subcontracting option that best meets the district's needs.

Learning From Districts' Experience

Boards have found that subcontracting of certain services can provide a cost savings and operational efficiencies. A mid-1990 NJSBA survey of school districts indicated that 70 percent of the responding districts had entered into full or partial subcontracting of some form of support services. Services contracted by school boards are almost exclusively "support" services, such as transportation, cafeteria, custodial and maintenance functions.

Districts responding to the survey indicated that economic efficiency was, by far, the most common reason for entering into subcontracting arrangements. However, many districts reported additional, and sometimes unexpected, benefits, such as: greater efficiency in the delivery of the service; relief from burden of operating noneducational services; less supervisory problems; better supervision of support services; and improved and expanded services.

Generally, most districts were highly satisfied with the quality of the services received from their subcontractors. However, a number of districts also identified concerns with the subcontracting, including: the bidding regulations and the need to rebid every few years; and loss of control over quality of performance. However, growing experience with subcontracting has led to an awareness that many of these concerns can be minimized through carefully designed arrangements with subcontractors.

Subcontracting Arrangements Boards' experience with subcontracting arrangements has highlighted the importance of the contract reached with the subcontractor. Well-written specifications which are protective of the board's interest can greatly minimize potential problems and concerns with quality of services.

For example, a board's specs can establish its right to investigate the abilities of the bidder and to reject any bid if the investigation reveals that the bidder is not qualified to satisfy the board's specifications for the contract. Further, boards can include specifications that:

- *assure the board's right to approve, or reject, any employee sent by the contractor;*
- *guarantee the board's right to discharge any employee provided by the contractor;*
- *establish standards of on-site supervision; and*
- *specify when the service will be rendered to minimize interruptions to the school's operations.* For example, to minimize noise and distraction, boards can require that maintenance of grounds must be done before or after the student day.

While these specifications may increase the cost of the subcontracted services, these costs may be a good investment in retaining district control over the individuals assigned to work in the district as well as in maintaining control of appropriate scheduling of services.

Arrangements for Displaced Employees The vast

majority of districts that determine to subcontract services arrange for some form of job continuity for their employees who will be displaced by subcontracting. Sometimes, concern for employees' jobs is addressed by phasing in subcontracting and outsourcing only the positions of retiring employees. Other boards have opted to subcontract only a portion of their support services, like the custodians' night shift, and retain their daytime employees. Most frequently, however, districts obtain a commitment from the subcontractor to offer employment to the board's current employees. This arrangement can range from a simple right of a first interview with the contractor to guaranteed employment for one or two years, with retention thereafter based on satisfactory performance. In addition, boards have negotiated severance packages that supplement the wages and benefits of the contractor for a defined period of time.

Again, all of these options may increase the cost of subcontracting and reduce the savings that can be obtained by privatizing services. However, as long as the board remains aware of the additional costs affiliated with guaranteed or subsidized employment, and these arrangements reflect the board's goals and philosophy, these costs may be a benefit to the district.

Unions' Reactions Up until the mid-1990s, the NJEA's reaction to subcontracting services has been to wage an intensely emotional local campaign against subcontracting. Local associations typically rejected boards' offers to consult over economically motivated subcontracting and preferred to activate their members and the community to bring pressure on the board to abandon any thoughts of privatization. These campaigns have focused on painting the worst possible scenario, including the loss of local control, the lack of accountability, and the ultimate costs of losing loyal local employees. They have preyed on the fears of having unknown strangers in the school buildings or school buses coming into contact with young school children. In a number of cases, the union's tactics resulted in sufficiently vocal community opposition that led the board to abandon its thoughts of subcontracting. However, boards' increased preparation, their careful calculations and protective arrangements with subcontractors, have not only defused community opposition but also increased boards' commitment to pursue their planned subcontracting.

Given the diminished returns of fear tactics, it is likely that the union may explore new tactics to protect their members' jobs. Unions may be more receptive to opportunities to consult over fiscally motivated subcontracting and may be willing to negotiate changes in existing terms and conditions of employment to minimize the cost savings affiliated with subcontracting. Boards must keep in mind that they are not under any obligation to accept these concessions and that the substantive decision to subcontract remains a nonnegotiable board action.

A number of support staff unions have also brought bargaining proposals to the negotiating table. These proposals have included a nonnegotiable commitment

that no subcontracting will occur during the life of the contract as well as issues that are legally negotiable. Boards must remain alert to the scope of negotiations and reject any agreement that cannot be legally enforced. Further, boards need to carefully assess the implications of the union's position on negotiable topics. For example, a union can propose an advance notice of the intent to subcontract that is so long as to virtually block the board from pursuing its subcontracting option during the life of the contract. In addition, a union's proposed severance package can be so costly that its acceptance would essentially offset any potential cost savings that could be achieved by subcontracting.

And finally, the NJEA may step up its annual efforts to enact legislation that would preclude, or diminish, boards' ability to enter into subcontracting arrangements. Board members must remain alert to these legislative initiatives and be prepared to engage in vigorous counter-lobbying efforts to oppose any effort to limit their cost containment options.

Summary

Subcontracting can be a viable option for boards of education. However, while the decision to subcontract does not require negotiations, it does involve a number of complex legal and practical considerations. The decision requires each board to engage in a great deal of local investigation, exploration, and analysis of its district's particular needs and circumstances. Although the decision must be tailored to each district's unique situation, boards can learn from each other's experience. As such, consider the valuable advice provided by one insightful respondent to the NJSBA's questionnaire on subcontracting:

Subcontracting is not a panacea. Each district has to assess its own needs and evaluate the different methods of providing services. Subcontractors are not unlike employees; they need direction, supervision and evaluation. Cost/benefits studies need to be performed to determine which method is more efficient and practical in the individual circumstances studied. Judgments should be made on efficiencies rather than on whether a company has the ability to arbitrarily cut wages below prevailing market costs. In other words, if you do not have good management capabilities, subcontracting will not provide described cost savings or efficiencies.